Lisa Brunn Gossett
Attorney at Law
5238 Birdwood
Houston, TX 77096

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NEPA Draft Report Commente
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building

Submitted by electronic mail to nepataskforce@mail.house.gov

NEPA has been a valuable piece of legislation. It not only has served the American public by bringing consideration of environmental issues into decision making-process, but also has provided an example of the importance of opening governmental decision-making processes to public review and input.

I appreciate this opportunity to comment on the Initial Findings and Draft Recommendations by the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act (the "Report.") I am program chair of the Environmental Management Program at the University of Houston – Clear Lake. I submit these comments in my personal capacity, but they reflect my experience as an environmental professional who works as a faculty member teaching and researching NEPA issues. They also are based on my experience as an attorney who practiced environmental law before becoming an academic, and my perspective as a citizen and mother concerned about the future of our nation.

MOVE CAUTIOUSLY TO IMPROVE NEPA

Like any major piece of legislation at 35 years after enactment, NEPA might be improved by some minor tweaking. However, as the Task Force Report indicated, it is "clear that the original policy goals of NEPA remain valid today" and that "there is little debate of NEPA's importance" or its "positive results." (Report at p.8.) The report also notes "there were no suggestions to eliminate or scale back any of NEPA's policy directives." (Report at p.10.) As such, I believe that any changes should be minor, cautiously made, and based on accurate information.

I support the recommendation to direct Council on Environmental Quality (CEQ) to promulgate regulations to address the enforcement of mitigation proposals (Recommendation 5.3). It may be more appropriate that agencies be directed by CEQ to develop procedures to require that mitigation be incorporated in any permit or other authorization, and that require follow-up and enforcement to ensure that promised mitigation is implemented.

I also support the recommendation to promulgate regulations that would encourage more consultation with stakeholders (Recommendation 6.1). Inclusion of stakeholders in the process is crucial to implementing the purposes of NEPA, and also could reduce litigation.

The creation of a "NEPA Ombudsman" (Recommendation 7.1) is another improvement that should increase the effectiveness of communications among stakeholders and agencies and minimize litigation. The details of the proposal were not clear. If the intent is to direct stakeholder input away from the decision-making agency, this proposal could raise concerns. Additionally, creation of such an office might be more appropriately handled by regulatory changes rather than amending NEPA itself.

The studies included in Recommendations 9.1 and 9.2 would provide the needed information to make additional improvements in the NEPA process. I support such studies.

The above proposals require additional work by the CEQ, which the Report already noted is "overwhelmed." Additional resources should be allocated to CEQ, and possibly other agencies, to address these issues.

DON'T CHANGE THE STATUTE WHEN REGULATIONS ARE ADEQUATE

The Report contains many recommendations that begin with the phrase "Amend NEPA to . . ." Many of these urge amending the statute to contain provisions which are already in regulations. As regulations promulgated under NEPA by the Council on Environmental Quality, they have the authority of law, and must be followed by agencies and applicants. Amending NEPA is not necessary to implement the changes. These include Recommendations 1.1, 1.3, 1.4, 5.2, and 6.2.

Other recommendations could be implemented through regulation rather than amendment of NEPA itself. For example, regulations could be amended to allow (not require) tribal, state, and local governmental entities (not all stakeholders) cooperating agency status (revision of Recommendation 3.1). The creation of an ombudsman office or implementing more effective procedures for incorporating information developed by states or other agencies can be accomplished by changes in the regulations rather than NEPA itself.

CONCERN WITH ACCURACY INFORMATION RELIED ON BY THE COMMITTEE

I urge the Committee to move cautiously, and confirm the accuracy of the information submitted when it considers any possible changes to NEPA. The report repeated portions of the testimony submitted to it, some if it admittedly reflecting the more extreme positions from those both supporting and criticizing NEPA. Information needs to be carefully evaluated for both accuracy and the potential biases of the contributors.

I have concerns with Recommendation 3.2, which directs CEQ to prepare regulations that allow existing state environmental review processes to satisfy NEPA requirements, and Recommendation 9.3, which addresses studying these issues. The Task Force Report used the example of oil and gas permitting in Texas. It states that "Texas has environmental procedures similar to NEPA," yet the process takes only 25-30% of the time required to obtain a federal permit. (Report at p.15.) I was surprised by this statement. Texas does not have a state mini-EIS process to be applied to projects with possible significant impact on the environment. The Texas Railroad Commission (which regulates oil and gas activities, not railroads) does not have a

process that compares with the level of information development and stakeholder involvement the NEPA process requires. When reviewing any state or agency process, caution should be taken that we are comparing proverbial apples with apples, not apples with oranges.

Of course, I encourage making the NEPA process more efficient and effective, and avoiding duplicative effort. Current regulations allowing state environmental review processes to satisfy commensurate NEPA requirements already exist in Section 1500.4 (j), (k), (n), and (o) of the current NEPA regulations. Section 102(2)(D) of NEPA itself also addresses this issue. The impediment to incorporating information from state and other agency procedures does not appear to be based on shortcomings in the statute or regulations, but other causes that would not be addressed by the proposed amendments.

COMMENTS ON LITIGATION

The Task Force Report noted that litigation was viewed by many as the biggest challenge with the NEPA process, and by others as one of the most effective tools to its success. (Report at p. 3.) The objective information gathered by the committee, however, indicates that the "problem" of excessive litigation is more perception than reality – there are relatively few lawsuits. (Report at p. 3 and p. 11.)

Of concern to me was an agency comment that stated the threat of litigation "forced" them to spend resources creating "bullet-proof" documents. (Report at p. 21.) There is no such thing as a bullet-proof document – a certain amount of litigation (hopefully minimal) is inevitable when dealing with sometimes contentious matters. If agencies are trying to reach an impossible standard of perfection, of course the process becomes drawn out and expensive.

We agree with the comment that litigation can "be reduced when agencies involved in a project collaborate effectively with all interested parties." (Report at p. 13.) By following NEPA regulations and working effectively with stakeholders, most litigation should be avoided. Also, when litigation does occur, the plaintiff currently has a difficult burden to show that an agency acted in an arbitrary and capricious manner. As noted in the report, relatively few NEPA lawsuits are successful. While some minor changes could be made to the NEPA regulations to clarify some procedural issues, I do not believe that excessive litigation is a significant issue the Task Force needs to address.

OTHER CONCERNS WITH THE REPORT

I am concerned with recommendations to arbitrarily place mandatory time and length limits on NEPA. Recommendation 1.2 states that "analyses not concluded" in the new timeframes "will be considered complete." (Report at p. 25.) This appears to stop the process based on an arbitrary time frame, not on the need to satisfy basic NEPA requirements. This would either (1) increase and encourage delays to avoid making available critical information on impacts, or (2) cause additional litigation because the fundamental requirements of NEPA would not be met. Suggested timeframes are appropriate, but this recommendation, with mandatory limits, seems to gut NEPA. Similar comments apply to the recommendation to set mandatory page limits (Recommendation 2.2).

Some of the frustrations expressed in the Task Force Report, such as those relating to interagency coordination and communication problems, arguably often are not the fault of NEPA. Other statutes or endemic agency turf issues are involved, and the concerns would not be resolved by amending NEPA.

CONCLUSIONS

Of course, the NEPA requirement to make factual information on environmental impacts available for public review and comment has not pleased everyone. Some pork-barrel projects are neither environmentally appropriate nor economically justified when the impacts and costs were considered and made public. Almost any project looks good if only the benefits are considered. NEPA has been a big step toward open government, and arguably more efficient and effective government. Unfortunately, not everyone wants light of sunshine on their proposed activities. Some who historically have profited from government largess as the expense of taxpayers would be among those who least like NEPA. As a taxpayer, I view NEPA as a cost-saving statute.

Again, NEPA has been a valuable tool in addressing environmental concerns, improving federal projects, and avoiding government waste. I urge that the committee move cautiously in making any amendments.

Respectfully submitted,

Lisa Brunn Gossett